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Nos. 90-1262, 90-1266

In The

Supreme Court of the United States

October Term, 1991

STATE OF ARKANSAS, et al.,

Petitioners,

v.

STATE OF OKLAHOMA, et al.,

Respondents.

ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

STATE OF OKLAHOMA, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF SIERRA CLUB, and *AMICUS CURIAE* BRIEF OF SIERRA CLUB, IN SUPPORT OF RESPONDENTS.

Date: July 19, 1991

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF SIERRA CLUB, IN SUPPORT OF RESPONDENTS.

Sierra Club hereby respectfully moves this Court, pursuant to Supreme Court Rule 37.4, for leave to file the attached Amicus Curiae Brief of Sierra Club in Support of Respondents.

The grounds for this motion are twofold. First, Sierra Club and its more than 630,000 members have a vital interest in protecting and enhancing the quality of the

nation's waterways. Sierra Club members, through organizational outings as well as individual activities, regularly use and enjoy for recreational, aesthetic and scientific purposes, thousands of lakes, rivers, streams and marine waters throughout this country, including the Illinois River in Arkansas and Oklahoma. The ruling below properly enforces the Clean Water Act's proscription against violation of federally-approved water quality standards for such waters. Second, the Sierra Club's counsel, the Sierra Club Legal Defense Fund, has expertise in the Clean Water Act and its regulations which can assist this Court in the disposition of this matter. The Legal Defense Fund has successfully prosecuted numerous citizen enforcement suits against violations of the Clean Water Act during the last decade, including *Sierra Club v. Union Oil Co.*, 813 F.2d 1480 (9th Cir. 1987), judgment vacated, 485 U.S. 931, 108 S.Ct. 1102, 99 L.Ed. 2d 264 (1988), judgment amended and reinstated, 853 F.2d 667 (9th Cir. 1988); *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517 (9th Cir. 1987); and *Sierra Club v. Electronic Controls Design, Inc.*, 909 F.2d 1350 (9th Cir. 1990).

In accordance with Supreme Court Rule 37.3, by letter dated June 28, 1991 Sierra Club requested petitioners State of Arkansas and the Environmental Protection Agency to consent to the filing of Sierra Club's proposed *amicus curiae* brief. As of this date, petitioner Environmental Protection Agency and petitioner State of Arkansas have consented to the filing.

For the foregoing reasons, Sierra Club moves this Court for leave to file the attached *Amicus Curiae* Brief of Sierra Club in Support of Respondents.

Date: July 19, 1991 Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae Sierra Club is a non-profit corporation organized and existing under the laws of the State of California, and has its principal place of business at 730 Polk Street, San Francisco, California 94109. The Sierra Club is a national conservation organization comprising over 630,000 members.

The objectives of the Sierra Club include the conservation, protection and sound management of natural resources, and the preservation and enhancement of our environment. The stated corporate purposes of the Sierra Club are:

> To enhance and protect by all lawful means the natural resources and human environment of the United States and the earth in general; to explore, enjoy, and preserve the scenic resources of the United States and its forests, waters, wildlife and wilderness; to undertake and to publish scientific, literary, and educational studies concerning them; to educate the people with regard to the national and state forests, parks, monuments, and other natural resources of especial scenic beauty and to enlist public interest and cooperation in protecting them.

The Sierra Club's concerns encompass the wise utilization and protection of the navigable waters of the United States. Members of the Sierra Club regularly use and enjoy these water resources, including the Illinois River which is the subject of this action, for fishing, boating, camping, swimming, photography, nature study and other forms of recreational, scientific and spiritual activity.

The Sierra Club's vital interest in this case stems from its long-standing and continuing efforts to assure proper interpretation and enforcement of the Clean Water Act. The Sierra Club has successfully prosecuted numerous citizen suits to enforce the effluent limitations and water quality standards of the Act where the Environmental Protection Agency and state water pollution control agencies have failed to do so, including *Sierra Club v. Simkins Industries, Inc.*, 847 F.2d 1109 (4th Cir. 1989), *cert. denied*, 491 U.S. 904, 109 S.Ct. 3185, 105 L.Ed.2d 693 (1989) and *Sierra Club v. Union Oil Co.*, 813 F.2d 1480 (9th Cir. 1987), *judgment vacated*, 485 U.S. 931, 108 S.Ct. 1102, 99 L.Ed.2d 164 (1988), *judgment amended and reinstated* 853 F.2d 667 (9th Cir 1988), *judgment on remand*, 716 F.Supp. 429 (N.D. Cal. 1988).

The principal issue presented in this case, whether upstream states may violate federally-approved water quality standards of downstream states, has significant implications for water resources in which the Sierra Club and its members have a compelling interest.

SUMMARY OF ARGUMENT

The Clean Water Act requires dischargers to comply with federally-approved water quality standards of affected states. 33 U.S.C. §§ 1311(b)(1)(C), 1312(a), 1313(c), 1341(a)(2), 1342(d)(2). To hold otherwise would permit states to export their water pollution without the consent of the receiving jurisdiction, unfairly shifting pollution problems, and the burden of waste treatment, to downstream states. Arkansas' "parade of horribles" is

unconvincing, and ignores Congress' scheme. Thus, the Tenth Circuit properly upheld EPA's determination that the Clean Water Act requires Arkansas to comply with Oklahoma's federally-approved water quality standards.

ARGUMENT

THE TENTH CIRCUIT CORRECTLY UPHELD EPA'S DETERMINATION THAT THE CLEAN WATER ACT REQUIRES DISCHARGERS TO COMPLY WITH ALL APPLICABLE WATER QUALITY STANDARDS.

A. Compliance With Federally-Approved Water Quality Standards Is The Paramount Objective Of The Clean Water Act.

The Clean Water Act codifies Congress' "national goal that the discharge of pollutants into navigable waters be eliminated by 1985." Section 101(a)(1),[1] 33 U.S.C. § 1251(a)(1). The purposes of this goal are "restoration and maintenance of the chemical, physical and biological integrity of the Nation's waters." *Id.* To achieve these objectives, the Act prohibits the discharge of any pollutants to navigable waters except as permitted by the Act. Section 301(a), 33 U.S.C. § 1311(a).

Congress created the National Pollutant Discharge Elimination System ("NPDES") to implement this discharge prohibition. Section 402, 33 U.S.C. § 1342. Under the NPDES program applicants for discharge permits must satisfy "all applicable requirements" under the Act,

[1] All section references are to the Clean Water Act, unless otherwise stated.

including both technology-based and water quality-based effluent limitations. 33 U.S.C. §§ 1342(a)(1), 1311(b), 1312, and 1313(b). EPA is required to establish and periodically update technology-based limits which, in ratchet-like manner, impose increasingly stringent standards as waste treatment technology improves over time. Sections 301(b) and 304(b), 33 U.S.C. §§ 1311(b) and 1314(b). Congress intended that the Act be "technology-forcing," stressing that it embodies a "mandate to press technology and economics" to achieve "increasingly tougher controls" on industrial effluent reduction. S.Rep. No. 414, *reprinted in* 1972 U.S. Code Cong. & Admin. News at 3668, 3709; *Natural Resources Defense Council v. EPA*, 822 F.2d 104, 123-24 (D.C. Cir. 1987).

EPA and the states share responsibility for establishing water quality-based limits. EPA develops water quality criteria designed to protect "plankton, fish, shellfish, wildlife, plant life, shorelines, beaches, esthetics and recreation." Section 304(a), 33 U.S.C. § 1314(a). Whenever EPA determines that technology-based effluent limitations are insufficient to assure protection of public health and beneficial uses, including "the protection and propagation of a balanced population of shellfish, fish and wildlife, and . . . recreational activities in and on the water," it "shall" establish water quality-based effluent limitations for the pertinent point-sources. Section 302(a), 33 U.S.C. § 1312(a). States are directed to develop, and at least every three years to update, water quality standards consistent with criteria adopted by EPA. Section 303(a), 33 U.S.C. § 1313(a); 40 C.F.R. Part 131.

> Such standards serve the dual purposes of establishing the water quality goals for a specific water body *and serving as the regulatory basis for establishment of water quality-based treatment controls* and strategies beyond the technology-based level of treatment required by sections 301(b) and 306 of the Act.

40 C.F.R. § 130.3, emphasis added.

If state-proposed water quality standards "protect the public health or welfare, enhance the quality of water and serve the purposes of this [Act],"[2] and are approved by EPA, they "shall thereafter be the water quality standard for the applicable waters of that State." Section 303(c)(3), 33 U.S.C. § 1313(c)(3). If EPA disapproves the state standards, it shall "promptly" propose and promulgate water quality standards for such state. Section 303(c)(4), 33 U.S.C. § 1313(c)(4).

EPA is responsible for issuing NPDES permits, but may delegate that authority to qualified states. Section 402(b), 33 U.S.C. § 1342(b). EPA issued the Fayetteville NPDES permit here in question, because at the time of its issuance, Arkansas had not yet received delegated permitting authority under Section 402(b). States may devise more stringent effluent limitations and water quality standards than the minimum requirements established in the Act and promulgated by EPA. Section 510, 33 U.S.C. § 1370; *Sierra Club v. Union Oil Co., supra,* 813 F.2d at 1487. More stringent state effluent limits, including those "required to implement any applicable water quality

---

[2] EPA's regulations clarify that to "serve the purposes of the Act," water quality standards should "wherever attainable, provide water quality for the protection and propagation of fish, shellfish and wildlife and for recreation in and on the water. . . . " 40 C.F.R. § 130.3.

standard established pursuant to the [Act]," are enforced under the Act. Section 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C).

The express language Congress selected in drafting the Clean Water Act leaves no doubt of its intent that water quality standards designed to protect fish, wildlife, recreation and other beneficial uses be strictly enforceable. Section 301(b)(1)(C) directs that

> In order to carry out the objective of this chapter there shall be achieved . . . not later than July 1, 1977 any more stringent limitations, including those necessary to meet water quality standards . . . established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) . . . or required to implement any applicable water quality standard established pursuant to this chapter.

33 U.S.C. § 1311(b)(1)(C).

Sections 402(a)(2) and 402(b)(1)(A) implement this mandate by prohibiting the issuance of any NPDES permit which does not assure compliance with Section 301:

> The [EPA] Administrator shall prescribe conditions for [EPA-issued NPDES] permits to assure compliance with the requirements of paragraph (1) of this subsection [which incorporates, inter alia, the requirements of Section 301]. . . .

33 U.S.C. § 1342(a)(2); *see also,* 33 U.S.C. § 1342(a)(3).

> The [EPA] Administrator shall approve each [proposed State NPDES permitting] program unless he determines that adequate authority does not exist: (1) To issue permits which – (A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312. . . .

33 U.S.C. § 1342(b)(1)(A).

Consistent with the foregoing, section 401 prohibits the issuance of any federal permit, including EPA-issued NPDES permits as issued to Fayetteville herein, which may affect the quality of water in a downstream state, unless the permit is conditioned "to insure compliance with applicable water quality requirements." 33 U.S.C. § 1341(a)(2). "If the imposition of conditions cannot insure such compliance such [federal agency] shall not issue such license or permit." *Id.; accord,* 40 C.F.R. § 121.2(a)(3) (state certifications under section 401 must assure that the proposed activity will not violate "applicable water quality standards") and 40 C.F.R. 124.53(e) (state certifications must assure compliance with sections 301 and 303, among others).

EPA's regulations governing the NPDES permitting process repeat the foregoing statutory commands:

> No [NPDES] permit may be issued when the imposition of conditions cannot ensure compliance with the *applicable water quality requirements of all affected states.*

40 C.F.R. § 122.4(d) (implementing Section 301(b)(1)(C) of the Act), emphasis added.

> [E]ach NPDES permit shall include conditions meeting the following requirements when applicable. . . .
>
> (d) *Water quality standards and state requirements: any requirements* in addition to or more stringent than promulgated effluent limitations, guidelines or standards under sections 301, 304, 306, 307, 318 and 405 of [the Clean Water Act] *necessary to* . . .
>
> (4) *Conform to applicable water quality requirements* under section 401(a)(2) of [the Clean

> Water Act] *when the discharge affects a state other than the certifying state.*

40 C.F.R. § 122.44(d)(4) (implementing Section 401(a)(2) of the Act), emphasis added.

EPA's regulations governing state adoption of water quality standards are in accord as well:

> In designating uses of a water body and the appropriate criteria for those uses, the State shall take into consideration the water quality standards of downstream waters *and shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters.*

40 C.F.R. § 131.10(b).

EPA's regulations likewise require that state certifications under Section 401 must assure that the proposed activity will not violate "applicable water quality standards." 40 C.F.R. § 121.2(a)(3).

The Tenth Circuit properly gave effect to this settled statutory and regulatory scheme. Courts should accord substantial deference to the consistent interpretation of a statute by the agency entrusted with its administration. *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37, 102 S.Ct. 38, 44, 70 L.Ed.2d 23 (1981); *E.I. DuPont De Nemours & Co. v. Train*, 430 U.S. 112, 135 n.25, 97 S.Ct. 965, 978 n.25, 51 L.Ed.2d 204 (1977) (EPA interpretation of Clean Water Act entitled to great weight, particularly in view of technical nature of statute and agency's expertise); *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965). Even assuming *arguendo* that Congress' intent to require upstream states to comply with federally-approved downstream water

quality standards is not clearly expressed, EPA's authoritative and consistent interpretation of the Act to so require is entitled to substantial deference. *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed. 694 (1984).

The Tenth Circuit's construction of the Act and its regulations, moreover, is fully consistent with the Act's legislative history. Congress noted that EPA

> is under a *specific obligation* to require that level of effluent control which is needed *to implement existing water quality standards without regard to the limits of practicality.*

S.Rep. No. 414, *reprinted in* 1972 U.S. Code Cong. & Admin. News at 3668, 3710, emphasis added. Even though in 1977 Congress relaxed the best available technology effluent limitations in certain circumstances, it declined to suffer any relaxation of water quality-based standards,[3] explaining:

> pressure must be maintained to assure improved water quality and to avoid slipping back.

S.Rep. No. 370, *reprinted in* 1977 U.S. Code Cong. & Admin. News at 4326, 4367.

Section 505(h) likewise reflects Congress' intent that downstream states be empowered to enforce their water quality standards against upstream polluters. 33 U.S.C.

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[3] The 1977 amendments allowed the substitution of "best practicable technology" for "best available technology" in respect to the discharge of certain pollutants provided "such modification will not interfere with the attainment or maintenance" of high levels of water quality. 33 U.S.C. § 1311(g).

§ 1365(h). This provision authorizes the governor of a state to sue EPA to enforce an "effluent standard or limitation under this chapter" whose violation in an upstream state is "causing a violation of any water quality requirement in his state." Because subsection (f) defines "effluent limitation or standard under this chapter" to include certifications under section 401 and NPDES permits under section 402, downstream states such as Oklahoma are plainly entitled to enforce their water quality standards against EPA discharge permits issued in upstream states such as Arkansas.

The Act's unambiguous mandate that dischargers comply with "any" applicable water quality standard established pursuant to the Act, as expressed in sections 301(b)(1)(C), 402(a)(2) and 402(b)(1)(A), and further enforced in Section 401(a)(2), is dispositive here. No other provision of the Act, including those on which Arkansas relies, purports to relieve dischargers of this paramount duty.

Arkansas urges nonetheless that dischargers are free to violate EPA-approved water quality standards in downstream states, on the grounds that section 402(b)(5) of the Act requires source states to consider, but not necessarily to accept, downstream state *recommendations* with respect to permit applications.[4] But section 402(b)(5)

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[4] Arkansas contends that section 402(b)(5) is applicable to EPA-issued permits on the grounds section 402(a)(3), directs that EPA-issued permits are "subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section."

does not purport to exempt upstream states from complying with downstream water quality *standards*. Indeed, it mentions neither section 301 nor section 401, nor the independent requirements they impose.[5]

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[5] And, of course, Section 402(d)(2) mandates that "[n]o permit shall issue" if EPA objects on the grounds a permitting state failed to accept recommendations from an affected state *or the permit is "outside the guidelines and requirements of [the Act]."* 33 U.S.C. § 1342(d)(2), emphasis added. The latter prohibition subjects NPDES permits to Section 301(b)(1)(C)'s requirement that discharges comply with water quality standards.

Although it is true that Section 402(d)(3) states that [t]he [EPA] Administrator may, as to any permit application, waive paragraph (2) of this subsection [i.e., Section 402(d)(2)], as the Tenth Circuit explained Congress did not intend thereby to vest EPA with discretion to ignore violations of downstream water quality violations. *State of Oklahoma v. EPA*, 908 F.2d 595, 611 n. 19 (10th Cir. 1990). EPA, moreover, readily concedes this point:

> [N]o waiver of review [under Section 402(d)(3), (e) or (f)] may be granted for the following classes or categories: . . .
>
> (2) Discharges which may affect the waters of a state other than the one in which the discharge originates.

40 C.F.R. § 123.24(d). EPA's regulations governing its "review of and objections to State permits," moreover, specifically identify as a ground for objection, "[t]he effluent limits of permit fail to satisfy the requirements of 40 C.F.R. 122.4(d)." 40 C.F.R. § 123.44. The latter regulation, as discussed *infra*, requires all NPDES permits to

> [c]onform to the applicable water quality requirements under section 401(a)(2) of [the Clean Water

(Continued on following page)

Rather, section 402(b)(5) merely directs that source states must solicit from affected states recommendations that may pertain to any aspect of a permit application. Since such recommendations obviously can address a host of concerns and suggestions extending well beyond the affected states' adopted minimum water quality standards, it is not surprising that the source state is not obliged to accept them. Such recommendations could well suggest, for example, advanced methods of waste treatment not otherwise required under the Act which would yield water quality much higher than required by the affected state's water quality standards. The overarching goal of the Act is, after all, total *elimination* of pollutants. 33 U.S.C. § 1251(a)(1). Promoting consultations that would *enhance* water quality, rather than merely avoid its illegal degradation is fully consonant with the Act's objectives. 33 U.S.C. § 1251. The fact that section 402(b)(5) imposes an *additional, consistent* duty on source states to afford downstream states an opportunity to submit recommendations concerning proposed upstream permits in no wise relieves such permits from compliance with sections 301 and 401.

(Continued from previous page)

> Act] when the discharge affects a State other than the certifying State.

The foregoing regulatory direction is fully consistent with Congress' intent that no NPDES permit be "less stringent than required by any State effluent limitations or water quality standards." H.R. Conf.Rep. No. 830, 95th Cong., 1st Sess. 97, *reprinted in* 1977 U.S. Code Cong. & Admin. News at 4424, 4472. *See* discussion in *State of Oklahoma v. EPA, supra,* 908 F.2d at 611.

Had Congress intended to relieve dischargers from the absolute duty to comply with *all* applicable water quality standards adopted pursuant to the Act, it could easily have expressly so provided. But section 402(b)(5) does not expressly, nor by necessary implication, do so. Under settled rules of statutory construction, absent clear language evincing a contrary intent, section 402(b)(5) should be read in harmony, rather than in direct conflict, with sections 301(b)(1)(C) and 401(a)(2) and the Act's paramount goal of water quality compliance they enforce. *Adams v. Howerton,* 673 F.2d 1036, 1040 (9th Cir. 1982), *cert. denied,* 458 U.S. 1111, 102 S.Ct. 3494, 73 L.Ed.2d 1373 (1982).

B. Arkansas' Demand That Upstream States Be Allowed To Satisfy Their Water Quality Standards By Exporting Their Wastes To Waters Of Downstream States Would Thwart The Clean Water Act.

Arkansas' petition asks this Court to declare "open season" on downstream water quality standards. As EPA conceded below, Arkansas' construction of the Act would make achieving downstream water quality standards "impossible in many circumstances or . . . possible only by imposing a disproportionate burden on dischargers located in the downstream state." *State of Oklahoma v. EPA, supra,* 908 F.2d at 606, quoting from EPA's Brief at 21.

Under Arkansas' interpretation, the water quality "floor" established by the federal minimum standards would become the "ceiling" of water quality for the nation. Arkansas' construction of the Act would punish states with more stringent water quality standards and

reward those states which ignore downstream water quality standards. Rewarding dischargers for locating in states with less stringent water quality requirements (by relieving them from complying with more stringent downstream water quality standards) would result in "pollution shopping," contrary to the Congress' intent:

> The result [of lax EPA oversight of state permit programs] might well be the creation of "pollution havens" in some of those States which have approved permit programs. *This result is exactly what the 1972 amendments were designed to avoid.*

S. Rep. No. 370, 95th Cong., 1st Sess. at 73, *reprinted in* 1977 U.S. Code Cong. & Admin. News at 4326, 4398, emphasis added.

The decision of the Tenth Circuit does not usher in a new era of water quality improvement, but rather merely gives effect to the existing statutory and regulatory regime. It allows the steady march toward elimination of water pollution to proceed, as Congress intended. The interpretation offered by Arkansas, by contrast, is a step backward in water quality improvement, and contrary to both the letter and spirit of the Clean Water Act and its regulations.

C. Arkansas' Invocation of *Ouellette* and Other Federal Preemption Cases Is Misplaced, Since No State Common Law Claims Are Presented Here.

Arkansas contends that *International Paper Co. v. Ouellette*, 479 U.S. 481, 107 S.Ct. 805, 931 L.Ed.2d 883 (1987) and *Illinois v. City of Milwaukee*, 731 F.2d 403 (7th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985) support its claim that federally-approved water quality standards of

a downstream state are not enforceable against upstream dischargers. Its reliance is misplaced. As the Tenth Circuit correctly observed, both of these cases involved a claim by a downstream state plaintiff against an upstream state discharger *under state common law*. These cases correctly held that in the context of inter-state water quality disputes, the Clean Water Act preempted state common law. In contrast, the Tenth Circuit properly concluded

> the case before us poses the question of the applicability of the *federally* approved water quality standards of an affected downstream state in permitting a discharge in an upstream state.

State of Oklahoma v. EPA, supra, 908 F.2d at 607. The Tenth Circuit accurately observed that *Ouellette*'s discussion of sections 401 and 402 was *dicta*. *Id.* at 608. Consistent with *Ouellette* and *Illinois*, federal law controls the allocation of water quality among the states. *Champion International Corporation v. EPA*, 652 F.Supp. 1398, 1399-1400 (W.D. N.C. 1986), *vacated for lack of subject matter jurisdiction and remanded*, 850 F.2d 182, 186-87 (4th Cir. 1988) (noting that EPA properly objected to North Carolina permit on grounds it threatened to violate downstream Tennessee water quality standards). And, as part I.A. of this brief explains, the Clean Water Act and its regulations require compliance by all dischargers with "any" applicable water quality standards adopted pursuant to the Act. Since Oklahoma's water quality standards were approved by EPA and apply to the segment of the Illinois River affected by the Fayetteville discharge, that discharge must comply with those standards.

D. Arkansas' "Parade of Horribles" Lacks Practical Merit and Improperly Asks this Court to Invade the Legislative Arena and Upset the Balance Already Struck by Congress.

Arkansas asserts the Tenth Circuit's ruling usurps source state prerogatives and will lead to "chaotic" conflicts between downstream and upstream states. Neither claim has merit. Under the Act no state has discretion to issue NPDES permits which violate federally-approved water quality standards. 33 U.S.C. § 1311(b)(1)(C). The Tenth Circuit's carefully reasoned decision merely enforces *Congress'* judgment that "there shall be achieved . . . not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards . . . established pursuant to [the Act]."

Arkansas' fear of "chaos" is likewise unfounded. EPA has ample authority under section 303 to assure that the state water quality standards it must review at least every three years are not in conflict and reflect the comprehensive water quality planning efforts states must conduct under sections 208 and 305. 33 U.S.C. § 1288, 1313 and 1315; 40 C.F.R. Parts 130 and 131. The surest means of avoiding and reconciling potential interstate conflicts is by implementing, rather than sabotaging, the water quality management and planning functions the Act mandates. Uniform enforcement of water quality standards will provide needed certainty for dischargers and the public alike. Compliance with federally-approved standards will avoid, not create, chaos. Arkansas' proposal that upstream states be given discretion to violate federal standards would have the opposite effect.

Finally, and most importantly, comparison of the potential conflicts which might flow from the respective positions of Arkansas and Oklahoma confirms the wisdom of the Tenth Circuit's ruling. If Oklahoma's position is sustained, some upstream dischargers may have to tighten their discharge limits, but *no* water quality standards of any state will be violated, and the fish, wildlife, recreation and other protected uses under the Act will be enhanced. If Arkansas' position is sustained, by contrast, although some upstream dischargers will save money, downstream states' water quality standards *will* be violated, and the beneficial uses dependent thereon *will* be harmed. Sierra Club submits that the former result is much more consonant with the purposes of the Clean Water Act than is the latter. Therefore this Court should affirm the Tenth Circuit's construction of the Act.

CONCLUSION

The judgment of the Tenth Circuit Court of Appeals holding that upstream state dischargers must comply with federally-approved water quality standards of downstream states should be affirmed.

Date: July 19, 1991

Respectfully submitted,

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